No. 17-1107

In the Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
JAMES A. MAYSONETT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

CAPITAL CASE

SUPPLEMENTAL QUESTIONS PRESENTED

1. Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status.

2. Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. 1151(a).

TABLE OF CONTENTS

Page

Summary of argument 1
Argument:
I. Congress granted the State of Oklahoma jurisdiction over respondent's crime, irrespective of the reservation status of land within the 1866 territorial boundaries of the Creek Nation 2
A. By statehood, Congress eliminated criminal-law distinctions between Indians and non-Indians in the Indian Territory 4
B. Upon the creation of the State of Oklahoma, Congress ensured that Indians in eastern Oklahoma would continue to be subject to the same criminal jurisdiction and laws as non-Indians 10
II. While there are no circumstances relevant here in which land constitutes a reservation but does not qualify as "Indian country" under 18 U.S.C. 1151(a), the reference to "Indian country" in 18 U.S.C. 1153(a) should not be construed to remove state jurisdiction over respondent's crime 18
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Barnett v. *Gross*, 216 P. 153 (Okla. 1923) 15
Buchanan, Ex parte, 94 P. 943 (Okla. 1908) 12
Fourco Glass Co. v. *Transmirra Corp.*, 353 U.S. 222 (1957) 16
George v. *Robb*, 64 S.W. 615 (Indian Terr. 1901) 15
Gon-shay-ee, Ex parte, 130 U.S. 343 (1889) 20
Hayes v. *Barringer*, 104 S.W. 937 (Indian Terr. 1907), aff'd, 168 F. 221 (8th Cir. 1909) 9

Cases—Continued: Page

Heff, In re, 197 U.S. 488 (1905) 10
Hendrix v. *United States*, 219 U.S. 79 (1911) 13, 14
Jefferson v. *Fink*, 247 U.S. 288 (1918) 5
Jones v. *State*, 107 P. 738 (Okla. Crim. App. 1910) 13
Marlin v. *Lewallen*, 276 U.S. 58 (1928) 5, 6
Muniz v. *Hoffman*, 422 U.S. 454 (1975) 16
National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 16
Negonsott v. *Samuels*, 507 U.S. 99 (1993) 21
Oklahoma Tax Comm'n v. *Chickasaw Nation*, 515 U.S. 450 (1995) 19
Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993) 19
Palmer v. *Cully*, 153 P. 154 (Okla. 1915) 15
Poff's Guardianship, In re, 103 S.W. 765 (Indian Terr. 1907) 9
Sizemore v. *Brady*, 235 U.S. 441 (1914) 15
State v. *Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989) 17
Stephens v. *Cherokee Nation*, 174 U.S. 445 (1899) 7
Stewart v. *Keyes*, 295 U.S. 403 (1935) 10, 12
Stevens v. *United States*, 146 F.2d 120 (10th Cir. 1944) 15
Solem v. *Barlett*, 465 U.S. 463 (1984) 2
Tidewater Oil Co. v. *United States*, 409 U.S. 151 (1972) 16
United States v. *John*, 437 U.S. 634 (1978) 19, 20
United States v. *Ryder*, 110 U.S. 729 (1884) 17

Constitution and statutes:

Act of Mar. 1, 1889, ch. 333, 25 Stat. 783 6
§ 5, 25 Stat. 783 6
§ 27, 25 Stat. 788 6

Statutes—Continued: Page

Act of May 2, 1890, ch. 182, 26 Stat. 81:
§§ 30-31, 26 Stat. 94-95 6
§ 31, 26 Stat. 96 6
§ 33, 26 Stat. 96-97 6
§ 36, 26 Stat. 97 6
Act of June 7, 1897 (Indian Department Appropriations Act), ch. 3, 30 Stat. 83 ..... 3, 7
Act of Mar. 1, 1901, ch. 676, §§ 10-22, 31 Stat. 864-867 8
Act of Mar. 3, 1901, ch. 869, 31 Stat. 1447 ..... 8, 9
Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 9
Act of May 8, 1906, ch. 2348, 34 Stat. 183 (25 U.S.C. 349) 10
Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286:
§ 2, 34 Stat. 1287 12
§ 3, 34 Stat. 1287 11
Act of June 25, 1948, ch. 645, 62 Stat. 757 (18 U.S.C. 1151) 2, 16, 18
18 U.S.C. 1151(a) 2, 16, 19, 21
Curtis Act (Indians in Indian Territory), ch. 517, 30 Stat. 495:
§ 14, 30 Stat. 499-500 8
§ 26, 30 Stat. 504 8
§ 28, 30 Stat. 504-505 8
§ 28, 30 Stat. 505 8
General Crimes Act, 18 U.S.C. 1152 20
Indian General Allotment Act, ch. 119, § 6, 24 Stat. 390 10
Indian Major Crimes Act, ch. 341, 23 Stat. 385 (18 U.S.C. 1153 (2012 & Supp. V. 2017)) 20
§ 9, 23 Stat. 385 ..... 14, 21
18 U.S.C. 1153(a) (Supp. V 2017) 2, 20, 21

Statutes—Continued: Page

Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267:
§ 2, 34 Stat. 268-269 10
§ 13, 34 Stat. 275 10
§ 16, 34 Stat. 276 11
§ 16, 34 Stat. 276, as amended by Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286-1287 11
§§ 17-20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907, ch. 2911, §§ 2, 3, 34 Stat. 1286-1287 3
§ 17, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907, ch. 2911, § 2, 34 Stat. 1287 11
§ 20, 34 Stat. 277, as amended by Act of Mar. 4, 1907, ch. 2911, § 3, 34 Stat. 1287 11
§ 21, 34 Stat. 277-278 ..... 3, 10

Miscellaneous:

Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914* (1999) 8
Cohen's Handbook of Federal Indian Law (Nell Jessup Newton et al. eds., 2012 ed.) 19, 20
29 Cong. Rec. (1897):
p. 2305 7
p. 2310 7
pp. 2323-2324 7
p. 2324 7
p. 2341 7
H.R. Exec. Doc. No. 1, Pt. 5, Vol. II, 49th Cong., 1st Sess. (1885) 14
H.R. Rep. No. 66, 51st Cong, 1st Sess. (1890) 5, 6, 7
H.R. Rep. No. 1188, 56th Cong., 1st Sess. (1900) 9
H.R. Rep. No. 1191, 58th Cong., 2d Sess. (1904) 5

Miscellaneous—Continued: Page

H.R. Rep. No. 152, 79th Cong., 1st Sess. (1945) 16, 17
S. Rep. No. 377, 53d Cong., 2d Sess. (1894) 5, 7
S. Rep. No. 7273, 59th Cong., 2d Sess. (1907) 11

In the Supreme Court of the United States

No. 17-1107

MIKE CARPENTER, INTERIM WARDEN, PETITIONER

v.

PATRICK DWAYNE MURPHY

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

The United States respectfully submits this brief in response to the Court's supplemental briefing order of December 4, 2018.

SUMMARY OF ARGUMENT

As the government contends in its merits-stage amicus brief (at 28-33), even if the former territory of the Creek Nation might still be recognized in some sense, Oklahoma would have criminal jurisdiction over crimes involving Indians occurring on unrestricted fee lands within that territory. From 1890 through Oklahoma statehood in 1907, Congress passed a series of statutes providing that Indians in the former Indian Territory were subject to the same criminal laws and prosecuted in the same courts as non-Indians. Congress never repealed those statutes, which continue to give Oklahoma jurisdiction over respondent's crime, regardless of the

reservation status of the former territory of the Creek Nation.

The government is aware of no circumstances in which an Indian reservation—set aside, maintained, and denominated as such for a federally recognized tribe—has not been recognized as Indian country under 18 U. S. C. 1151(a). The statutory definition of "Indian country" is broad, and this Court has interpreted it to include formal and informal reservations, dependent Indian communities, trust lands, and restricted allotments. Nonetheless, the Indian Major Crimes Act, 18 U.S.C. 1153(a) (Supp. V 2017), which since 1948 has employed the phrase "Indian country" as defined in Section 1151, does not provide the United States with exclusive jurisdiction over major crimes by Indians within the Creek Nation's former territory, irrespective of whether that territory is in some sense a reservation.

ARGUMENT

I. CONGRESS GRANTED THE STATE OF OKLAHOMA JURISDICTION OVER RESPONDENT'S CRIME, IRRESPECTIVE OF THE RESERVATION STATUS OF LAND WITHIN THE 1866 TERRITORIAL BOUNDARIES OF THE CREEK NATION

The circumstances of the Five Tribes in the former Indian Territory in eastern Oklahoma were unique and bear no resemblance to those of the Tribes in this Court's decisions in the *Solem* v. *Bartlett*, 465 U.S. 463 (1984), line of cases. Those cases concerned whether, in disposing of surplus lands and opening up a reservation within an existing State to non-Indian settlement, Congress had disestablished or diminished the reservation in question. By contrast, *prior* to Oklahoma statehood, the lands of the Five Tribes in the former Indian Territory had *already* been widely settled by

non-Indians—to such an extent that by Oklahoma statehood, there were approximately 70,000 members of those Tribes out of a total population of 700,000. See Gov't Amicus Br. 9. Non-Indians in the Indian Territory resided, worked, and did business on the Five Tribes' lands and were intermingled with tribal members.

Accordingly, *prior* to statehood—and indeed as critical components of breaking up the territories of the Five Tribes and replacing those tribal domains and the Indian Territory with the new State—Congress passed a series of statutes that transformed the governance of that vast region. Thus, Congress abolished tribal courts, barred enforcement of tribal law in the United States Court for the Indian Territory, and ensured that all individuals in the Indian Territory, "irrespective of race," Act of June 7, 1897 (1897 Act), 30 Stat. 83, were subject to the same laws and to the jurisdiction of the same court, including in criminal matters. Then, following statehood, Congress transferred prosecution of *all* crimes of a local nature—including those committed by Indians—to the state courts. Congress specifically designated those state courts as "successors" to the United States Court for the Indian Territory, Oklahoma Enabling Act of June 16, 1906, §§ 17-20, 34 Stat. 276-277, as amended by Act of Mar. 4, 1907 (1907 Act), §§ 2, 3, 34 Stat. 1286-1287, and ensured that a uniform body of Oklahoma law would apply in the former Indian Territory, Enabling Act § 21, 34 Stat. 277-278. Those statutes were never repealed. Nothing suggests that Congress, at statehood or thereafter, *sub silentio* revived throughout the former Indian Territory the very distinctions between Indians and non-Indians that it

had expressly eliminated in preparing the Territory and all its residents alike for statehood.

This statutory framework compels the conclusion that crimes committed by or against Indians on unrestricted fee lands in eastern Oklahoma are subject to state jurisdiction, even if this Court were now to conclude, 111 years after statehood, that all of the eastern part of the State consists of Indian reservations. But this statutory framework also confirms that in both law and fact there are no such reservations encompassing the Five Tribes' former territories; by virtue of these statutes, the vast areas of unrestricted fee lands in eastern Oklahoma lack the hallmarks of reservation status, because federal and tribal law do not apply to those lands.

A. By Statehood, Congress Eliminated Criminal-Law Distinctions Between Indians And Non-Indians In The Indian Territory

Congress initially intended to leave the Five Tribes undisturbed in the Indian Territory, subject to their own laws and jurisdiction. See Gov't Amicus Br. 8. As non-Indians flooded the area, however, Congress grew increasingly concerned with what it viewed as the inadequacy of tribal courts and law enforcement. Congress accordingly granted some jurisdiction to a new United States Court for the Indian Territory while retaining some jurisdiction over Indians in tribal courts, but soon determined that the dual systems of justice—one for Indians, and one for non-Indians—were unsustainable.

Thus, between 1897 and 1904, Congress enacted laws to create one system of justice to bring order to the Indian Territory. Congress applied federal and assimilated Arkansas law to Indians and non-Indians alike. It

granted the Court for the Indian Territory exclusive jurisdiction over criminal (as well as civil) cases involving both Indians and non-Indians. And it abolished tribal courts and prohibited the application of tribal law in the Court for the Indian Territory. By the eve of statehood, Congress had eliminated, for all relevant purposes, criminal-law distinctions between Indians and non-Indians.

1. Unlike in other territories, Congress never established a territorial government in the Indian Territory. Instead, the area was initially governed primarily by tribal law, but then was increasingly governed directly by Congress through the laws it "enacted or put in force." *Jefferson* v. *Fink*, 247 U.S. 288, 290-291 (1918); see *Marlin* v. *Lewallen*, 276 U.S. 58, 60-61 (1928); S. Rep. No. 377, 53d Cong., 2d Sess. 6-8 (1894) (1894 Senate Report) (report of Select Committee on the Five Tribes). For most of the late 19th century, tribal courts enforced tribal law, while federal courts in Arkansas, Kansas, and Texas exercised limited federal jurisdiction over non-Indians. See 1894 Senate Report 7-8; H.R. Rep. No. 1191, 58th Cong., 2d Sess. 1 (1904) (Indian Territory was "practically a court-governed Territory without a legislature and without an executive.").

Over time, Congress determined that the distant federal courts were inadequate to meet the needs of the growing non-Indian population of the Indian Territory. See 1894 Senate Report 7-8. Congress took the view that "[t]he whole Indian Territory * * * ha[d], owing to the failure of Congress to provide courts adequate to the wants of the people, become the refuge of criminals and desperadoes from all parts of the country." H.R. Rep. No. 66, 51st Cong., 1st Sess. 6 (1890) (1890 House Report).

As a result, in 1889, Congress created the United States Court for the Indian Territory. Act of Mar. 1, 1889, 25 Stat. 783. The court's criminal jurisdiction was limited to offenses "not punishable by death or by imprisonment at hard labor," § 5, 25 Stat. 783, and excluded crimes between Indians, § 27, 25 Stat. 788.

The next year, Congress extended the court's jurisdiction, Act of May 2, 1890 (1890 Act), § 33, 26 Stat. 96-97, and provided that the laws of the United States prohibiting crimes in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States," § 31, 26 Stat. 96. With certain exceptions, the criminal laws of Arkansas were assimilated and extended to the Indian Territory for offenses not otherwise governed by federal law. § 33, 26 Stat. 96-97. The Court for the Indian Territory was granted jurisdiction over "all controversies arising between members or citizens" of different Indian nations, including in criminal cases, and the defendant was "subject to the same punishment in the Indian Territory as he would be if both parties were citizens of the United States." § 36, 26 Stat. 97. But the 1890 Act preserved for the Tribes "exclusive jurisdiction of all cases wholly between members of the tribe, and * * * the adopted Arkansas statutes [did] not apply to such cases." *Marlin*, 278 U.S. at 61; see §§ 30-31, 26 Stat. 94-95.

2. A conviction soon emerged in Congress, however, that it was unsustainable for Indians and non-Indians to live side-by-side in the Indian Territory—the latter greatly outnumbering the former, see 1890 House Report 7-8—while being subject to two different legal regimes. Indeed, the 1890 House Report stated that "[t]he Indian should be protected by the same law that

protects the white man." *Id.* at 10. The 1894 Senate Report expressed concern that tribal courts could not address disputes between Indians and non-Indians, and noted "just cause of complaint among the Indians as to the character of their own courts." 1894 Senate Report 7; see *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 449 (1899) (quoting this language).

Congress responded in 1897 by vesting the Court for the Indian Territory with "exclusive jurisdiction" to try all "criminal causes" for the punishment of offenses by "any person" in the Indian Territory, as well as "all civil causes in law and equity" arising there. 1897 Act, 30 Stat. 83. And Congress made the laws of the United States and Arkansas in force in the Indian Territory applicable to "all persons therein, *irrespective of race*." *Ibid.* (emphasis added).

The 1897 Act reflected the judgment that it was "absolutely impossible" for the separate court systems to "continue to exist." 29 Cong. Rec. 2305 (1897) (Sen. Vest); see, *e.g.*, *id.* at 2323-2324 (Sen. Berry) ("[S]ome change is absolutely necessary. * * * [The tribal courts] are incapable of rendering justice between their own citizens and are bringing scandal upon each of those nations."). Whether Members of Congress supported or opposed this measure, they understood that it "place[d] Indians upon precisely the same plane as the white men." *Id.* at 2324 (Sen. Berry). Indian defendants would "be tried the same as the white men who are now in the Territory." *Ibid.*; see *id.* at 2341 (Sen. Vilas) (the Court for the Indian Territory would "decide all causes of every description" under United States and Arkansas law); *id.* at 2310 (Sen. Bate) (1897 Act eliminated Tribes' "exclusive jurisdiction, where Indians alone are concerned, in both criminal and civil suits"). The Court for

the Indian Territory thus administered law of a local nature for Indians and non-Indians alike, with the local law largely supplied by assimilating the state law of Arkansas.

3. The following year, Congress enacted the Curtis Act, §§ 26, 28, 30 Stat. 495, 504-505, which prohibited the enforcement of tribal law "by the courts of the United States in the Indian Territory," and "abolished" "all tribal courts" in the Territory. The Curtis Act provided that "all civil and criminal causes then pending in any [tribal] court shall be transferred to the United States court in [the Indian] Territory." § 28, 30 Stat. 505.

The Curtis Act provided in another respect for equal application of local laws to Indians and non-Indians alike. It provided for cities and towns within the Indian Territory with a population of at least 200 to be incorporated pursuant to Arkansas law; extended the right to vote in the governance of the cities and towns to all male inhabitants of those areas, whether "citizens of the United States or of * * * [the] tribes"; and provided that "all inhabitants of such cities and towns, *without regard to race*, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protection therein." § 14, 30 Stat. 499-500 (emphasis added); see Act of Mar. 1, 1901, §§ 10-22, 31 Stat. 864-867 (town site provisions of Original Creek Agreement). By 1907, more than 300 towns, totaling nearly 250,000 inhabitants, existed in the Indian Territory. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, at 187 (1999).

4. In 1901, Congress granted United States citizenship to every Indian in the Indian Territory. Act of

Mar. 3, 1901, 31 Stat 1447. The House Report explained the reasons for doing so: "The independent self-government of the Five Tribes has practically ceased," and "[t]he policy of the Government to abolish classes in Indian Territory and make a homogenous population is being rapidly carried out." H.R. Rep. No. 1188, 56th Cong., 1st Sess. 1 (1900). Through citizenship, the Report explained, the Indians would be able to "properly protect their rights" and would "be put upon a level and equal footing with the great population with whom they are now intermingled." *Ibid.*

5. In 1904, Congress reconfirmed the equal treatment of Indians and non-Indians under a uniform body of law. In legislation providing for additional United States judges in the Indian Territory, Congress once again provided that "[a]ll the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, *whether Indian, freedmen, or otherwise.*" Act of Apr. 28, 1904 (1904 Act), § 2, 33 Stat. 573 (emphasis added). Congress further granted the Court for the Indian Territory "full and complete jurisdiction * * * in the settlements of all estates of decedents, [and] the guardianships of minors and incompetents, whether Indian, freedmen, or otherwise." *Ibid.*; see *Hayes* v. *Barringer*, 104 S.W. 937, 938 (Indian Terr. 1907) (holding that the 1904 Act "took from the Indian tribes all jurisdiction"), aff'd, 168 F. 221 (8th Cir. 1909); *In re Poff's Guardianship*, 103 S.W. 765, 766 (Indian Terr. 1907) (similar with respect to probate and guardianship matters).

Thus, on the eve of statehood, *all* individuals in the Indian Territory—"whether Indian, freedmen, or otherwise," 1904 Act § 2, 33 Stat. 573—were subject to the

same substantive laws, both civil and criminal, and to the same jurisdiction of the Court for the Indian Territory, including in criminal cases.[1]

B. Upon The Creation Of The State Of Oklahoma, Congress Ensured That Indians In Eastern Oklahoma Would Continue To Be Subject To The Same Criminal Jurisdiction And Laws As Non-Indians

In 1906, Congress enacted the Oklahoma Enabling Act, which authorized the creation of a new State out of the Oklahoma and Indian Territories. In doing so, Congress did not reinstate the very distinctions between Indians and non-Indians it had eliminated in the Indian Territory in preparation for statehood. To the contrary, the Enabling Act ensured that Indians and non-Indians in the former Indian Territory would continue to be subject to the same criminal (and civil) laws and jurisdiction.

1. The Enabling Act extended the laws of the Oklahoma Territory over the Indian Territory, and all of its inhabitants, in place of the laws of Arkansas to govern matters of a local nature, until the legislature of the new State of Oklahoma provided otherwise. §§ 2, 13, 21, 34 Stat. 268-269, 275, 277-278; see *Stewart* v. *Keyes*, 295 U.S. 403, 409-410 (1935). The statute did not apply distinct criminal laws to Indians and non-Indians, resurrect the tribal courts, or permit application of tribal law throughout the former Indian Territory.

---

[1] In 1906, in response to *In re Heff*, 197 U.S. 488 (1905), Congress amended Section 6 of the Indian General Allotment Act, 24 Stat. 390, to provide, *inter alia*, that an Indian allottee would be subject to the "exclusive jurisdiction of the United States" until the issuance of a fee patent. Act of May 8, 1906, 34 Stat. 183 (25 U.S.C. 349). Congress further provided, however, that the Act "shall not extend to any Indians in the former Indian Territory."

The Enabling Act's provisions confirmed that Indians and non-Indians were to be treated alike following statehood. "[A]ll causes * * * arising under the Constitution, laws, or treaties of the United States" that were pending in the Court for the Indian Territory were to be transferred to the newly created United States District Court for the Eastern District of Oklahoma. § 16, 34 Stat. 276. "[A]ll" other pending cases—*i.e.*, those of a local nature—were to be transferred to the new state courts, the "successors" to the United States Court for the Indian Territory. §§ 17, 20, 34 Stat. 276-277. That category included criminal cases involving Indians on Indian lands, to which the laws of Arkansas had been applied in 1897 and 1904 in the same manner as for all other persons—and to which the laws of the Territory (and then of the State) of Oklahoma were thereafter applied by the Enabling Act.

The next year, Congress amended the Enabling Act to fix a drafting error. Congress had provided for all cases "in which the United States may be a party" to be transferred to the new federal district courts. Enabling Act § 16, 34 Stat. 276. But because "[a]ll criminal cases pending in the courts in the Indian Territory we[re] brought in the name of the 'United States,' * * * this provision would [have] * * * transfer[red] all criminal cases to the United States district and circuit courts of the eastern district of the State of Oklahoma." S. Rep. No. 7273, 59th Cong., 2d Sess. 1 (1907). Congress therefore amended the Enabling Act to ensure that "[a]ll criminal cases pending in the United States courts in the Indian Territory" not transferred to the new federal district courts in the State—*i.e.*, cases of a local nature—would be "prosecuted to a final determination in the State courts of Oklahoma." 1907 Act § 3, 34 Stat.

1287; see generally *Stewart*, 295 U.S. at 409-410 (noting that the Oklahoma Constitution designated the new state courts as successors to the Court for the Indian Territory). The 1907 Act thus ensured the transfer to state courts of all cases of a local nature, whether "civil or criminal." § 2, 34 Stat. 1287.

2. a. As the United States has explained (Gov't Amicus Br. 29-30), following statehood, these Acts were consistently interpreted to grant comprehensive criminal jurisdiction to the State in the former Indian Territory—including jurisdiction over crimes by Indians that would have fallen within federal jurisdiction or the exclusive jurisdiction of the Tribes if the usual rules governing Indian country had applied. From the outset, the officials charged with implementing the Enabling Act and enforcing criminal law carried out that congressional plan.

Thus, the sole judge of the new United States District Court of the Eastern District of Oklahoma ordered that "all prisoners" then awaiting trial "in the custody of the United States marshals" be delivered to the "state authorities," except where the offense was "of a federal character," on the ground that the Enabling Act had deprived the federal courts of jurisdiction over such cases. *Ex parte Buchanen*, 94 P. 943, 945 (Okla. 1908). The Supreme Court of Oklahoma held that state courts had assumed jurisdiction over all crimes "not of a federal character" in the former Indian Territory, which it described as crimes not committed "within a fort or arsenal or in such place in said territory over which jurisdiction would have been solely and exclusively within the jurisdiction of the United States, had it at that time been a state." *Id.* at 944. The Supreme Court of Oklahoma made no exception for crimes of a local nature

involving Indians, and the Oklahoma state courts regularly exercised criminal jurisdiction over crimes between Indians—including prosecutions for murder[2]—in the former Indian Territory. See Gov't Amicus Br. 30; Pet. Br. 39-42. Conversely, from the time of statehood to the present day, the United States has not exercised criminal jurisdiction over crimes by or against Indians within the Creek Nation's 1866 borders—except, since the early 1990s, over the small fraction of that land that still consists of restricted allotments or parcels of tribal trust land. See Gov't Amicus Br. 21-22, 32-33.

This Court's decision in *Hendrix* v. *United States*, 219 U.S. 79 (1911), reflects this shared understanding that the State had general criminal jurisdiction over Indians in the former Indian Territory. See Gov't Amicus Br. 30. The Court there held that a pre-statehood statute, which permitted a Choctaw or Chickasaw Indian charged with murder committed in the Indian Territory to be tried in federal district court in Texas, continued to apply following statehood. The Court therefore rejected the defendant's contention that the case should be transferred to state court. 219 U.S. at 90-91. But the Court did not question the premise of the defendant's argument that, as a general matter, criminal cases involving Indians pending in the Court for the Indian Territory were to be transferred to state court. See Pet.

---

[2] For example, in *Jones* v. *State*, 107 P. 738 (Okla. Crim. App. 1910), a Choctaw tribal member was indicted prior to statehood for murder committed in the Indian Territory; following statehood, he was tried in state court, *id.* at 738-739, and sought relief in this Court, see Mot. For Leave to File Petition for Writ of Habeas Corpus at 4, *In re Jones*, 231 U.S. 743 (1913) (petitioner informed the Court that he was "a full blood Choctaw Indian").

Br. at 11, *Hendrix*, *supra* (No. 10-319). Nor did the United States, which instead explained that the Enabling Act's provision for transfer of such cases to state court did not apply because the case was not pending in the Court for the Indian Territory at statehood, having already been transferred to the federal court in Texas. Gov't Br. at 17, *Hendrix*, *supra* (No. 10-319).

It is particularly clear that the state courts had jurisdiction over crimes committed by Indians against other Indians following statehood, because if they did not, then *no* court would have had jurisdiction over most such crimes throughout eastern Oklahoma. That is because if, contrary to our principal submission, the entirety of the former Indian Territory consisted of Indian reservations—and if, contrary to the statutes discussed above, Congress intended to subject the entire area to the default jurisdictional rules governing Indian country—federal jurisdiction over crimes between Indians would have been limited to the crimes listed in the Major Crimes Act, § 9, 23 Stat. 385. Under that Act, jurisdiction over non-major crimes between Indians was left to the tribe concerned. But the tribal courts of the Five Tribes had been abolished in 1898. Given Congress's concern with law and order in the area, it is inconceivable that Congress would have left such a large jurisdictional gap in the new State, without so much as a mention in the legislative record.[3]

---

[3] Respondent has suggested (Br. 48-49) that any jurisdictional gap could have been filled by the Interior Department, which in 1883 began to establish by regulation "Courts of Indian Offenses." But respondent acknowledges (Br. 49) that "the [governing] regulations excluded" the Five Tribes. See H.R. Exec. Doc. No. 1, Pt. 5, Vol. II, 49th Cong., 1st Sess. 21 (1885). And while respondent states (Br. 49) that "a pen stroke" could have altered that exception, the fact

b. Further underscoring the unique legal regime in eastern Oklahoma, courts contemporaneously understood that civil cases involving Indians were also to be treated in the same manner as those involving non-Indians. In cases arising before statehood (but in some instances litigated thereafter), courts applied Arkansas law to certain civil disputes involving Indians. See, *e.g.*, *Sizemore* v. *Brady*, 235 U.S. 441 (1914) (affirming Oklahoma Supreme Court decision that Arkansas, rather than Creek, law governed inheritance); *George* v. *Robb*, 64 S.W. 615 (Indian Terr. 1901) (holding Arkansas law applied to inheritance dispute between Creek citizens). And in cases arising after statehood, the state courts applied state law to controversies involving Indians. See, *e.g.*, *Barnett* v. *Gross*, 216 P. 153 (Okla. 1923) (contract dispute involving Creek defendant); *Palmer* v. *Cully*, 153 P. 154 (Okla. 1915) (per curiam) (Oklahoma law governed marriage between two Seminole members after 1904); see *Stevens* v. *United States*, 146 F.2d 120, 122 (10th Cir. 1944) (finding it "clear that the marriage relations of Creek Indians in Oklahoma are subject to the laws of the state.").

3. In 1942, Oscar L. Chapman, the Assistant Secretary of the Interior, confirmed in a letter to the Attorney General that the State had jurisdiction over crimes in eastern Oklahoma involving Indians, based on a thorough examination by the Interior Department of the statutes discussed above. Gov't Amicus Br. App. 1a-6a. The Assistant Secretary concluded that the 1897 Act and subsequent statutes relating to the Indian Territory "completely altered the situation in that Territory

---

that the Interior Department did not do so following statehood confirms that it (like Congress, federal and state courts, and the State of Oklahoma) did not perceive a jurisdictional gap.

with respect to jurisdiction over Indian crimes," by applying the laws of Arkansas in force in the Territory to all persons "regardless of race" and "abolish[ing] the Indian courts and tribal jurisdiction and organization." *Id.* at 3a. Those Acts, the Assistant Secretary explained, "removed the essential characteristic of Indian country." *Ibid.* Under the Enabling Act, he further concluded, "the State courts succeeded to the jurisdiction of the Territorial courts," *id.* at 4a, and "[j]urisdiction of all crimes by and against Indians is in the State courts," *id.* at 5a.

4. Congress's codification in 1948 of the statutory definition of "Indian country," which includes "land within the limits of any Indian reservation under the jurisdiction of the United States," 18 U.S.C. 1151(a), does not alter this analysis. Congress enacted that definition as part of its comprehensive revision of the federal criminal code. Act of June 25, 1948, 62 Stat. 757 (18 U.S.C. 1151). Nothing suggests that Congress intended to implicitly repeal the existing, more specific jurisdictional framework governing eastern Oklahoma. See, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored") (citation omitted). Instead, "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 162 (1972); see H.R. Rep. No. 152, 79th Cong., 1st Sess. A85-A86 (1945) (1945 House Report). "To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable." *Muniz* v. *Hoffman*, 422 U.S. 454, 470 (1975); see, *e.g.*, *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222 (1957);

United States v. *Ryder*, 110 U.S. 729, 740 (1884). That is particularly true here because the Revisers expressly stated their intent to codify early 20th century case law regarding Indian country. 1945 House Report A85-A86. Cf. Gov't Amicus Br. App. 7a-8a (1963 letter from the Secretary of the Interior to the Attorney General concluding that the 1948 codification did not change the Interior Department's views in the 1942 letter regarding jurisdiction over allotments).[4]

5. A contrary conclusion would significantly disrupt law enforcement in the State of Oklahoma. As noted above, in the 111 years since Oklahoma statehood, we are aware of *no* criminal case involving an Indian that the United States has prosecuted on the theory that the State lacks criminal jurisdiction over crimes occurring throughout the former Indian Territory. See Gov't Cert. Amicus Br. 20; Gov't Amicus Br. 32-33. Transferring jurisdiction over such cases from the State to the United States would vastly increase the scope of federal jurisdiction over crimes involving Indians in eastern

---

[4] Respondent observes (Br. 47) that much of eastern Oklahoma remained in restricted allotments at statehood; that the State exercised jurisdiction over crimes involving Indians on those lands; and that the Oklahoma Court of Criminal Appeals held in the late 1980s that the State lacked such jurisdiction, see *State* v. *Klindt*, 782 P.2d 401, 403 (1989). As the government has explained (Gov't Amicus Br. 32-33), the United States argued at the time of *Klindt* and subsequent cases that the State had jurisdiction over crimes committed by or against Indians throughout the former Indian Territory, including on restricted allotments. But this Court denied review in several cases raising that issue, and the United States has since then exercised criminal jurisdiction over those allotments. *Ibid.* This case involves jurisdiction over unrestricted fee lands in the former Indian Territory. Questions of jurisdiction over restricted allotments are not before the Court. See Gov't Cert. Amicus Br. 19-20.

Oklahoma, stretching federal resources in the area. See Gov't Cert. Amicus Br. 21-22. And it would threaten decades of state convictions, including in cases in which the statute of limitations has run and the evidence has gone stale. See Pet. Reply Br. 20-21; 11/27/18 Oral Arg. Tr. 29-31, 75-76. By contrast, recognizing that Oklahoma has criminal jurisdiction over offenses on unrestricted fee lands in the former Indian Territory—regardless of that area's reservation status—would avoid such disruption.[5]

II. WHILE THERE ARE NO CIRCUMSTANCES RELEVANT HERE IN WHICH LAND CONSTITUTES A RESERVATION BUT DOES NOT QUALIFY AS "INDIAN COUNTRY" UNDER 18 U.S.C. 1151(a), THE REFERENCE TO "INDIAN COUNTRY" IN 18 U.S.C. 1153(a) SHOULD NOT BE CONSTRUED TO REMOVE STATE JURSIDICTION OVER RESPONDENT'S CRIME

1. This Court has interpreted the general definition of "Indian country" in 18 U.S.C. 1151 broadly to "include[] 'formal and informal reservations, dependent Indian communities, and Indian allotments, whether re-

---

[5] To be sure, a holding that the State obtained exclusive criminal jurisdiction over *all* lands in the former Indian Territory could have other destabilizing effects. It would encourage challenges to *federal* convictions, obtained since the early 1990s, for crimes committed by or against Indians on restricted allotments and parcels of tribal trust land within the former Indian Territory, which constitute only a small percentage of that vast area. See Gov't Amicus Br. 32-33; p. 17 n.4, *supra*. It could also raise questions about the application of federal, tribal, and state law more generally to those allotments and trust lands. For that reason, as well as the others given in the government's merits amicus brief, we urge the Court to resolve this case by holding that there is no modern-day Creek reservation encompassing the entirety of the former territory of the Creek Nation.

stricted or held in trust by the United States.'" *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995) (quoting *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993)); see *United States* v. *John*, 437 U.S. 634, 649 (1978). Section 1151(a) defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. 1151(a). As relevant here, we are unaware of circumstances in which an Indian reservation—set aside, maintained, and denominated as such for a federally recognized tribe—has not been recognized as Indian country under the statutory definition. But such a reservation would normally entail the application of some federal law even on fee lands within its boundaries, which would in turn reflect that the lands are "under the jurisdiction of the United States Government" under Section 1151(a). *Ibid.* Here, however, the unrestricted fee lands in eastern Oklahoma, and Indians present on them, are subject to state, not federal, jurisdiction.[6]

2. Nonetheless, a determination that the Creek Nation's former territory is "Indian country" under Section 1151(a) would not mean that the State lacked criminal jurisdiction over respondent's crime. As discussed

---

[6] State-recognized reservations are not "under the jurisdiction of the United States Government," and thus do not constitute Indian country under Section 1151(a). *Cohen's Handbook of Federal Indian Law* § 3.04[2][c][ii], at 191 (Nell Jessup Newton et al. eds., 2012 ed.); see *id.* § 3.02[9], at 168. That is of no moment here, however, because Oklahoma has not recognized a modern-day Creek reservation.

above, see pp. 16-17, *supra*, Congress codified the definition of "Indian country" in 1948 as part of its general revision of the federal criminal code, without any suggestion that it intended to implicitly repeal the more specific jurisdictional framework that had applied in eastern Oklahoma for decades.

Nor does application of the Major Crimes Act, 18 U.S.C. 1153(a) (Supp. V 2017), to "Indian country" suggest that Congress intended the federal government to exercise exclusive jurisdiction over major crimes committed by Indians in eastern Oklahoma. That statute provides for federal jurisdiction over certain offenses —including murder—committed by one "Indian * * * against the person or property of another Indian or other person" in "Indian country." *Ibid.* Although this Court has stated that the Major Crimes Act's grant of federal jurisdiction is generally exclusive of state jurisdiction, see, *e.g.*, *John*, 437 U.S. at 651 & nn.21-22, that reading is not required by the statutory text. While Section 1153(a) provides that covered offenders "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States," 18 U.S.C. 1153(a) (Supp. V 2017), that language is best understood to identify the class of laws to be applied (*i.e.*, those applying "within the premises, grounds, forts, arsenals, navy-yards, and other places * * * over which the federal government has by cession, by agreement, or by reservation exclusive jurisdiction," *Ex parte Gon-shay-ee*, 130 U.S. 343, 352 (1889)), rather than the effect of Section 1153 on state jurisdiction. See 18 U.S.C. 1152 (employing similar language); cf. *Cohen's Handbook of Federal Indian Law* § 6.04[3][d], at 562-563 (Nell Jessup Newton et al. eds., 2012 ed.)

(suggesting that States and federal government may exercise concurrent criminal jurisdiction in optional Public Law 280 States). But see *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993) (suggesting that federal jurisdiction under the Major Crimes Act generally "is 'exclusive' of state jurisdiction").

Indeed, the history of the Indian Territory indicates that even if the Creek Nation's former territory qualified as a present-day reservation, the Major Crimes Act would not mandate exclusive federal criminal jurisdiction. The Major Crimes Act was first enacted in 1885. § 9, 23 Stat. 385. At that time, as relevant here, it stated that "all Indians, committing against the person or property of another Indian or other person" one of the enumerated crimes within "any Territory of the United States" would be tried "in the same courts and in the same manner and shall be subject to the same penalties" as all other persons. *Ibid.* Yet, to the extent that rule applied in the Indian Territory, it was "superseded" by the 1897 and 1904 Acts, Gov't Amicus Br. App. 2a-3a, which brought all crimes committed by Indians in the Indian Territory under the same laws (federal and assimilated Arkansas law) and into the same court (the United States Court for the Indian Territory) as crimes committed by non-Indians.

Nor was the Major Crimes Act revived to govern throughout the former Indian Territory upon statehood. As discussed above, the Enabling Act and 1907 Act ensured that crimes of a local nature committed by Indians following statehood would be prosecuted in state—rather than federal—court, and the enactment of Section 1151(a) in 1948 did not divest the State of that jurisdiction.

CONCLUSION

For the foregoing reasons, as well as those provided in the government's brief as amicus curiae supporting petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY BOSSERT CLARK
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
JAMES A. MAYSONETT
Attorneys

DECEMBER 2018